MOTION FILED
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No. 01-1363

IN THE
Supreme Court of the United States

PETER TERRITO AND STEVEN KENNEDY, *et al.*,

Petitioners,

v.

ALFRED ADAMS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA FIFTH CIRCUIT COURT OF APPEAL

MOTION OF COOPER/T. SMITH STEVEDORING COMPANY, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Cooper/T. Smith Stevedoring Company, Inc. ("Cooper") hereby respectfully moves, pursuant to S. Ct. R. 37.2, for leave to file a brief *Amicus Curiae* in support of the petition for a writ of *certiorari* filed in this case. Counsel for all of the Petitioners have consented to the filing of the *Amicus Curiae* brief. Counsel for 66 of the 67 Respondents in the case have also consented. However, *Amicus Curiae* is forced to file this motion because counsel for one of the Respondents has withheld consent.* A copy of the proposed brief is attached.

As is more fully explained in the section of the attached brief entitled "Interest of *Amicus Curiae*," Cooper is an Alabama Stevedoring Company that has employed thousands of longshoremen, either directly or through its predecessor entities, over the last forty (40) years in several different states, including the State of Louisiana. In the instant case, the Louisiana appellate court's decision has rendered meaningless the exclusive remedy and exclusive liability provisions that form the cornerstone of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* ("LHWCA"). This novel and erroneous interpretation of the LHWCA, which the Louisiana Supreme Court has refused to correct, has stripped all longshore employers and co-employees in Louisiana of their federally guaranteed right to immunity from suit in occupational disease cases. As a consequence, *Amicus Curiae* has found itself in the same position as the Petitioners in this case, having to defend numerous mesothelioma and other occupational asbestos

* Only counsel for Respondent Earlven Gauthe (and the heirs of Earlven Gauthe) has withheld consent to *Amicus Curiae's* request to file a brief in support of the petition for writ of *certiorari* in the captioned matter.

disease tort claims that are barred by the LHWCA. Given the large potential judgment value of asbestos disease cases, the high cost of defending them, the problems created by the inherently unfair, decades-long delays typically associated with the filing of asbestos claims, and the plethora of asbestos-related bankruptcies that have been filed by the truly culpable parties all across the country, Cooper and other similarly situated stevedoring companies have been left fighting for their economic survival.

Consequently, *Amicus Curiae* is well positioned to address the questions presented in this case and is uniquely able to assist the Court in determining whether to grant *certiorari*. In particular, the proposed brief of *Amicus Curiae* serves to point out: (1) that in violation of the Supremacy Clause of the U.S. Constitution, the Louisiana court's opinion has effectively vacated a federal statute and federally guaranteed rights and immunities; (2) that allowing a state tort suit against longshore employers or co-employees is contrary to and undermines the purpose of the LHWCA, which was to ensure longshoremen a certain, speedy and inexpensive, no-fault compensation remedy against their employers while, as a *quid pro quo*, guaranteeing employers and co-employees immunity from tort exposure; (3) that the object of the development of the doctrine of concurrent jurisdiction was to allow an election between compensation remedies, not to allow a plaintiff to "opt out" of compensation coverage to pursue a state tort law remedy; and (4) that the decision rendered by the Louisiana courts in this case not only impacts shipyards, but will also have a far reaching impact on stevedoring companies and all others covered by the LHWCA.

Because the issues listed above are relevant to the issue presented in the petition for a writ of *certiorari* and have not previously been brought to the Court's attention,

Amicus Curiae submits that its attached proposed brief will be of assistance to the Court in determining whether to grant *certiorari*. For that reason and in light of the fact that only one of the 67 Respondents has withheld consent to the filing of the proposed brief, Cooper requests that this "Motion for Leave to File Brief *Amicus Curiae*" be granted and that Cooper's proposed "Brief *Amicus Curiae* in Support of Petitioner" be accepted and filed in this matter.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Amicus Curiae,[1] Cooper/T. Smith Stevedoring Company, Inc. ("Cooper"), is an Alabama stevedoring company that has employed thousands of longshoremen, either directly or through its predecessor entities, over the last forty (40) years in several different states, including the State of Louisiana. As was the case with the entire stevedoring industry, for decades, there was no question that Cooper longshoremen who were injured in the State of Louisiana while performing their duties loading or discharging cargo on vessels in navigable waters fell within the scope and coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.*, ("LHWCA"). As was the case with the entire stevedoring industry, there was also no question that the LHWCA barred Cooper employees from bringing tort suits against Cooper for occupational diseases, and that their remedy was an election of either compensation benefits under the LHWCA, or compensation benefits under the Louisiana Workers' Compensation Act.

Recently, however, through its opinion in the instant case, the Louisiana Fifth Circuit Court of Appeal has unsettled these longstanding legal and economic principles by holding that injured longshoremen, under the guise of an election of remedies, can "opt out" of LHWCA coverage, select a state compensation remedy in its stead, and then pursue state tort actions against their employers for occupational diseases on the theory that the state compensation law in effect at the time of the alleged exposure did not actually cover the longshoremen's claims. This decision by the state intermediate court violates the Supremacy Clause of the U.S. Constitution because it effectively

1. Neither counsel for the petitioners nor counsel for the respondents authored this brief in whole or in part. No person or entity, other than *amicus curiae*, or its counsel, made a monetary contribution to the preparation or submission of the brief.

vacates the LHWCA and the rights that the Act guarantees. The state court's ruling directly conflicts with the plain language of the LHWCA and federal case law interpreting the scope and effect of federal immunity statutes, including the LHWCA. It also completely defeats the dual purposes of the LHWCA, which are to ensure that a no-fault compensation remedy is available to all longshoremen against their employers while, as a *quid pro quo*, guaranteeing longshore employers and co-employees immunity from suit.

In addition to these important legal considerations, the state circuit court's opinion, if not rectified, threatens the economic viability of not only the shipbuilding industry, but also the stevedoring industry. The Louisiana appellate court's novel and erroneous interpretation, which the Louisiana Supreme Court has refused to correct, has retroactively stripped all longshore employers and co-employees of immunity from suit in occupational disease cases in Louisiana. As a result, Cooper has found itself in the same position as the Petitioners in this case, having to defend numerous mesothelioma and other serious occupational asbestos disease tort claims that are barred by the LHWCA. Not only do these cases have potentially high judgment values, but they are also very expensive to defend because of the absence of witnesses and documents regarding events that allegedly occurred three to four decades ago. Compounding these problems, which are created by the inherently unfair, decades-long delays typically associated with the filing of asbestos claims, are the plethora of bankruptcies that have been filed by the truly culpable parties in these matters. All of this has left *Amicus Curiae* fighting for its economic survival.[2] Other companies similarly situated to *Amicus Curiae*

2. This Court has previously taken note of the burden imposed upon all litigants in asbestos personal injury litigation. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

face the same financial crisis and ruination. Moreover, the ruling of the Louisiana court in this case sets a dangerous precedent that could open the door for other states to disregard the provisions of the LHWCA and allow longshoremen injured in their jurisdictions to pursue state law tort actions against longshore employers.

Because the Louisiana court's ruling violates the Supremacy Clause, ignores federal law interpreting the scope and effect of the LHWCA, and creates a conflict between Louisiana and other states with respect to the immunity provided by the LHWCA to employers, it should be reviewed and reversed by this Court.

SUMMARY OF ARGUMENT

The Louisiana appellate court erred as a matter of longstanding law in ruling that the LHWCA did not bar the plaintiff shipyard workers' occupational disease tort claims against their co-employees, even though the claims were covered by the LHWCA. The court's ruling was based upon the erroneous premise that the plaintiffs could reject, under concurrent jurisdiction principles, the remedies provided in the LHWCA in favor of state workers' compensation remedies, and then pursue a tort action on the theory that the version of the state compensation statute in effect at the time of the alleged exposures, decades ago, did not actually cover the plaintiffs' claims. Federal law is clear that concurrent jurisdiction only exists between state and federal *compensation* remedies; concurrent jurisdiction does *not* exist between federal compensation and state tort law. The authorization by the Louisiana court of a tort action against the Petitioners violates the exclusive remedy and exclusive liability provisions of the LHWCA, thereby defeating Congress' legislative will.

Congress had a dual objective in passing the LHWCA. First, Congress sought to provide a no-fault compensation remedy for all longshoremen injured on the job. The *quid pro quo* for employers was that while they would be required to pay compensation benefits without regard to fault, they also would have tort immunity. The Louisiana appellate court's ruling is repugnant to, and violative of these principles. Because federal law governs the interpretation of federal immunity statutes and federal law preempts state law when the exercise of state authority conflicts with federal law, the ruling below must yield to federal preemption of the field. Accordingly, the Louisiana appellate court's ruling should be reviewed and reversed by this Court.

ARGUMENT

A. The purpose of the LHWCA

While the form of the LHWCA was a topic of heated debate during the legislative process, the proposal of a uniform federal compensation scheme had the "unqualified support of both the employers and employee representatives."[3] Since its inception in 1927, the Act has barred tort actions by longshoremen against their employers, providing comprehensive compensation coverage instead. 33 U.S.C. § 905(a), which commands that the liability of an employer for compensation benefits ". . . shall be exclusive and in place of all other liability of such employer to the employee" has not been altered since the passage of the original Act.

The purpose of the Act has been recognized and commented upon by the courts. For example, in *Haynes v. Rederi A/S Alladdin*, 362 F.2d 345, 350 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020, 87 S. Ct. 731, 17 L. Ed. 2d 557 (1967), the

3. 1A Benedict on Admiralty § 7 (7th ed. 1994).

United States Court of Appeals for the Fifth Circuit explained the purpose of the LHWCA as follows:

> Suffice it to say that appellant completely misconceives the purpose and function of the Act; the whole theory of the Act, and of similar compensation legislation, is to provide the injured workman with certain and absolute benefits **in lieu of *all* common law damages.** (*Emphasis added*).

A few years later, citing *Haynes*, the Fifth Circuit again discussed the purpose of the Act in *Gaudet v. Exxon Corp.*, 562 F.2d 351, 356 (5th Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S. Ct. 2253, 56 L. Ed. 414 (1978):

> The LHWCA was designed to provide an injured employee with certain and absolute benefits in lieu of possible common law benefits obtainable only in tort actions against his employer . . . when an employee begins work for an employer under the coverage of the LHWCA, he is **presumed to have consented to the Act's trade-off of possibly large common law damages for smaller but certain LHWCA benefits.** And by the very act of continuing in employment, he may be assumed to agree that, considering the likelihood of injury and the likely severity of injury within the working conditions he experiences, the benefits offered by the LHWCA in the event of injury are acceptable. (*Emphasis added*).

By pursuing a tort action against Petitioners, the plaintiffs in this case have effectively "broken the deal" that was the cornerstone of the LHWCA, destroying the *quid pro quo* that Congress so carefully created.

This Honorable Court has also commented upon the purpose and intent of the LHWCA. In *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 636, 103 S. Ct. 2045, 2052, 76 L. Ed. 2d 194 (1983), this Court wrote:

> . . . the Act is not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other. Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail.

The Act is not a one-way street.

The decision by the Louisiana intermediate court in the case at bar directly contradicts these cases and the purpose and function of the Act. The effect is harmful to both employers and employees. Employers and co-employees are stripped of the limited and predictable liability that the Act contemplated. Employees lose their ability to recover without the expense, uncertainty, and delay that tort actions entail. This is clearly not what Congress intended.

B. Concurrent jurisdiction exists only between federal and state compensation remedies.

When passed in 1927, the LHWCA remedied numerous judicial decisions that had invalidated earlier congressional efforts to delegate authority to the States to provide compensation coverage to workers who were injured upon

navigable waters of the United States. Although the Act appeared to link federal and state law to provide complete coverage for maritime workers, the boundary at which state remedies gave way to federal remedies remained obscure in the years immediately following the passage of the Act. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 717, 100 S. Ct. 2432, 2435, 65 L. Ed. 2d 458, 461 (1980). Consequently, injured workers were compelled to make a jurisdictional guess before filing a claim, with the price of error being unnecessary expense at best, and, at worst, foreclosure from the proper forum by statutes of limitation. *Id.*

After a decade and a half of uncertainty created by judicial interpretations that excluded employees falling within a "maritime but local" sphere from LHWCA coverage, this Court, in *Davis v. Department of Labor*, 317 U.S. 249, 254, 63 S. Ct. 225, 228, 87 L. Ed. 246 (1942), *reh'g denied*, 317 U.S. 713, 63 S. Ct. 438, 87 L. Ed. 567 (1943), broadened the jurisprudential scope of the LHWCA. In an attempt to satisfy Congress' intent to provide a sure and certain compensation remedy for longshoremen, this Court acknowledged that the uncertainty engendered by the maritime but local doctrine "defeat[ed] the purpose of the federal act, which [sought] to give . . . hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation, and the state acts . . . which aim[ed] at sure and certain relief for workmen." *Davis*, 317 U.S. at 254, 63 S. Ct. at 228, 87 L. Ed. at 249. As a result, this Court concluded that the border between state and federal compensation schemes should be treated as a "twilight zone," not a distinct line. *Id.*

The creation of the "twilight zone" was a practical solution to a practical problem: how to assure injured waterfront employees the simple, prompt and certain protection of the no-fault workmen's compensation remedy intended by

Congress, in light of judicial interpretations that had excluded employees falling within the "maritime but local" exception from LHWCA coverage. *Peter v. Hess Oil Virgin Island's Corp.*, 903 F.2d 935, 944 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067, 111 S. Ct. 783, 112 L. Ed. 2d 846 (1991). *Davis* effectively told injured employees that in doubtful cases, they would be assured of workmen's compensation benefits whether they proceeded under state or federal law. *Bethlehem Steel Co. v. Moore*, 335 U.S. 874, 69 S. Ct. 239, 93 L. Ed. 417 (1948). Within this "twilight zone," then, *Davis* established a regime that allows concurrent jurisdiction between federal and state compensation schemes. *Sun Ship*, 447 U.S. at 717, 100 S. Ct. at 2435, 65 L. Ed. 2d at 461.

In *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 82 S. Ct. 1196, 8 L. Ed. 2d 368 (1962), this Court further overlapped federal and state law coverage for marine workers in finding that the LHWCA covered "all injuries sustained by employees on navigable waters," without regard to whether the locus of an event was "maritime but local" and, hence, within the "twilight zone" where state compensation provisions could apply. *Calbeck*, 370 U.S. at 124, 82 S. Ct. at 1202, 8 L. Ed. 2d at 375. This Court in *Calbeck* interpreted the statutory phrase, "if recovery . . . may not validly be provided by State law", to mean that the LHWCA would cover injuries occurring on navigable waters, a situation in which prior decisions had questioned the availability of a state compensation remedy. This LHWCA coverage for injuries within the "twilight zone" was held to exist whether or not a particular injury was also within the constitutional reach of a state workers' compensation law. *Calbeck*, 370 U.S. at 126-127, 82 S. Ct. at 1203, 8 L. Ed. 2d at 376-377. However, in extending the LHWCA into the "maritime but local" zone, this Court also observed that an injured worker inside the zone was limited by

the Act to an election between state and federal compensation remedies. *Calbeck*, 370 U.S. at 120-124, 82 S. Ct. at 1201-1202, 8 L. Ed. 2d at 373-375. Summarizing, this Court noted:

> Congress brought under the coverage of the Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law.

Calbeck, 370 U.S. at 126-127, 82 S. Ct. at 1203-1204.

In 1972, as part of an effort to minimize the need for litigation and increase the importance and adequacy of statutory compensation as the principal method for remedying longshore injuries, Congress amended the LHWCA. The statutory amendment enhanced the benefits available to employees and expanded the Act's coverage beyond traditional navigable waters and into specific adjoining areas "customarily used by an employer in loading, unloading, dismantling or building a vessel." 33 U.S.C. § 903. Congress was aware that modern longshoring techniques involved an increased amount of work on land, and recognized that the availability of compensation should not depend upon the "fortuitous circumstances of whether the injury occurred on land or over water." *Peter*, 903 F.2d at 948 (citing S. Rep. No. 92-1125 at 13; H.R. Rep. No. 92-1441 at 10-11, 1972 U.S. Code Cong. & Admin. News 4708). Congress thus sought to provide a seamless blanket of LHWCA coverage for all longshore injuries. *Peter*, 903 F.2d at 948-949. As a result, § 902 and § 903 of the Act were amended to provide coverage to any person who engaged in maritime employment, including any longshoreman or other person who participated in longshoring operations, together with any harborworkers, such as ship repairmen, shipbuilders, and shipbreakers. Pub. L. No. 92-576, 86 Stat. 1251.

In 1980, this Court, in *Sun Ship*, *supra*, addressed the question of whether the landward extension of the LHWCA's coverage displaced states from applying their own workmen's compensation schemes to land-based injuries that were included in the expanded federal coverage. *Sun Ship* arose in the context of an injured worker who sought to elect state compensation benefits that were more lucrative than the benefits available under the LHWCA. This Court concluded that Congress had not, during the process of amending the LHWCA in 1972, expressed any intent to alter the accepted understanding that federal compensation jurisdiction would coexist with state compensation laws. *Sun Ship*, 447 U.S. at 722, 100 S. Ct. at 2437, 65 L. Ed. 2d at 464. To ensure that every worker has access to a no-fault remedy, this Court ruled that the availability of a federal compensation remedy did not exclude the possibility of a compensation remedy under state law. *Id.*, 447 U.S. at 725, 100 S. Ct. at 2439, 65 L. Ed. 2d at 466.

In 1984, Congress overhauled the LHWCA to provide, in the case of an occupational disease that does not immediately result in an injury or death, that for purposes of the Act, an injury shall be deemed to arise on the date on which the employee or claimant becomes aware of the disease, or should have been aware of it in the exercise of reasonable diligence or by reason of medical advice.[4] In 1984, Congress also added Section 903(e) to the Act to provide that any amounts paid to an employee pursuant to any other workers' compensation law for the same injury for which benefits are claimed under the Act "shall be credited against any liability imposed by [the Act]."[5]

4. This provision is directly applicable in the instant case. The Louisiana appellate court inexplicably chose to ignore this federal statutory directive.

5. This provision contemplates concurrent compensation jurisdiction. It likewise was ignored by the Louisiana appellate court, (Cont'd)

As this statutory history reveals, the central purpose underlying the LHWCA was to create a uniform compensation system that guarantees a longshoreman a no-fault remedy against his employer in exchange for the employer and co-employees being immune from tort liability. Stated another way, state workers' compensation is the only state remedy that can exist concurrently with the LHWCA's compensation remedy. However, in the case at bar, the state court, without any legal basis, impermissibly overrode this federal congressional directive.

C. Because concurrent federal and state jurisdiction under the LHWCA is limited to compensation liability, the Louisiana Appellate Court's ruling violates preemption principles.

In the instant case, the plaintiffs' occupational diseases did not manifest until 1993 or thereafter; consequently, all of the plaintiffs' claims were governed by the post-1984 version of the LHWCA.[6] The Louisiana Court of Appeal, however, ignored the 1984 amendment and ruled, under the auspices of a pre-1984 Louisiana Supreme Court decision, *Poche v. Avondale Shipyards, Inc.*, 339 So. 2d 1212 (La. 1976), and under the guise of an election of remedies, that the injured longshoremen could "opt out" of LHWCA coverage in favor of a state compensation remedy. The lower state court committed reversible error by deciding that the plaintiffs could pursue tort suits against Petitioners despite the federal statutory proscription. This ill-

(Cont'd)
which allowed the plaintiffs to pursue tort remedies in lieu of the LHWCA compensation remedy.

6. *See Castorina v. Lykes Bros. S.S. Co., Inc.*, 758 F.2d 1025, 1031 (5th Cir. 1985), *cert. denied*, 474 U.S. 846, 106 S. Ct. 137, 88 L. Ed. 2d 113 (1985).

conceived ruling should be reviewed and reversed because it directly conflicts with federal law and is repugnant to the congressional objectives of the LHWCA.

It is well settled by this Court that state power is preempted by federal legislation where (1) it was the clear and manifest purpose of Congress to do so or (2) the exercise of dual authority is repugnant to the congressional objective. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S. Ct. 1590, 36 L. Ed. 2d 280 (1973). Whether a federal immunity statute applies to a particular claim is an issue of federal law — not state law. *Grantham v. Avondale Industries, Inc.*, 964 F.2d 471, 473-474 (5th Cir. 1993). In determining the scope of a federal statute, if the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, the language must be regarded as conclusive. *United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 2527, 69 L. Ed. 2d 246, 252 (1981).

The Louisiana appellate court's authorization of state law tort actions against the Petitioners challenges federal supremacy. The Supremacy Clause of the U.S. Constitution imposes upon state courts a constitutional duty to protect all the substantive rights of the litigants under controlling federal law. *Felder v. Casey*, 487 U.S. 131, 151, 108 S. Ct. 2302, 2314, 101 L. Ed. 2d 123 (1988). Under the clause, the relative importance to the state of its own law is not material when a conflict exists with a valid federal law. Any state law that interferes with or is contrary to federal law must yield to laws enacted by Congress. *Felder*, 487 U.S. at 138, 108 S. Ct. at 2307.

In the present case, a preemption analysis necessarily requires consideration of: (1) whether the LHWCA evidences a congressional intent to preempt the entire area, (2) whether the LHWCA is inconsistent with the application of a state tort

remedy so that it would be impossible for the defendant to comply with both federal and state law, or (3) whether the state tort remedy "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" in enacting the LHWCA. *Schneidewind v. A.N.R. Pipeline, Co.*, 485 U.S. 293, 300, 108 S. Ct. 1145, 1150-51, 99 L. Ed. 2d 316 (1988). While Congress has not expressly declared in the LHWCA that it has preempted the states from providing state compensation benefits to workers covered by the Act, it is clear that the exercise of state authority to allow a *tort* remedy, as was allowed by the Louisiana appellate court in the present case, is repugnant to Congressional objectives.

Congress' intent in enacting the LHWCA was to provide injured longshore workers a straightforward no-fault compensation remedy in exchange for limiting the liability of the longshore employer to payment of compensation benefits.[7] The Act has been interpreted to allow concurrent jurisdiction so that longshoremen can choose to receive state compensation benefits if those benefits are more lucrative than LHWCA benefits. However, this does not conflict with congressional intent because the worker still receives a no-fault recovery and the longshore employer and co-employees still enjoy immunity from suit. By contrast, to allow longshore employees to pursue a state tort action deprives them of their no-fault remedy, forces

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7. This is further evidenced by the fact that the LHWCA only provides a set-off for the payment of state compensation. Section 903(e) of the LHWCA provides that "any amounts paid to an employee for the same injury . . . for which benefits are claimed under this chapter pursuant to any other workers' **compensation law** . . . shall be credited against any liability imposed by this chapter." 33 U.S.C. § 903(e). (Emphasis added). It is telling that there is no mention of any credit for benefits claimed under state tort law. Congress chose not to allow an employee covered by the LHWCA to pursue tort claims under state law.

the employees to satisfy the heightened burden of proving negligence as a prerequisite to recovery, exposes the employees to unnecessary legal fees and costs of litigation, and, worst of all, puts the employees at risk of having no remedy if they are unable to prove employer or co-employee negligence. In like fashion, deviating from the LHWCA strips the employer and co-employees of the federally guaranteed right to immunity from suit that is the cornerstone of the LHWCA's compensation scheme, and thereby renders meaningless both the exclusive remedy and the exclusive liability provisions of the LHWCA. The intermediate state court's approach is inconsistent with the LHWCA and "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." The state court's conclusion is, therefore, statutorily preempted. *Schneidewind*, 485 U.S. at 300, 108 S. Ct. at 1150-1151.

The decision of the Louisiana court in this case directly conflicts with the opinions of several federal appellate courts that have found that the post-1984 version of the LHWCA preempts state law tort actions in situations covered by the Act. In *Peter*, 903 F.2d at 950-953, for instance, the Third Circuit, after a detailed analysis, found that a refinery employee who was exposed to jet fuel was barred by federal supremacy principles from pursuing a state law negligence action against his employer because application of the state's law would frustrate the full purposes and objectives of Congress as reflected in the LHWCA. Similarly, although the case involved a tort claim against a third party as opposed to a compensation claim against an employer, the Ninth Circuit ruled in *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1058-1060 (9th Cir. 1997), *cert. denied*, 522 U.S. 1107, 118 S. Ct. 1034, 140 L. Ed. 2d 101 (1998), that a state wrongful death action brought by the heirs of a marine surveyor who was killed in a fall was preempted by the LHWCA. Likewise, the Fifth Circuit in *Perron v. Bell*

Maintenance and Fabricators, Inc., 970 F.2d 1409, 1412-1414 (5th Cir. 1992), held that the LHWCA prohibited a worker's attempt to recover on a state law respondeat superior tort theory from the nominal employer of a co-worker, where the worker and co-worker were borrowed servants of the same employer.

The Louisiana appellate court reasoned that a worker can elect a state compensation remedy in place of one under the LHWCA and then pursue a tort suit against his employer and its executive officers, on the theory that his claim falls outside of the coverage of the state compensation act. This not only defies logic, but conflicts with the entire body of federal jurisprudence defining the scope and effect of the LHWCA. In addition, the lower court's reasoning is internally incongruous. If the state compensation scheme does not apply to the claim, then concurrent compensation jurisdiction does not exist and the longshoreman's remedy falls exclusively within the LHWCA. Because concurrent jurisdiction can not exist between the LHWCA and state tort remedies, the exclusive remedy provisions of the LHWCA bar the plaintiffs' state law tort actions as a matter of law. Accordingly, the Louisiana circuit court's ruling should be reviewed and rectified by this Honorable Court.

CONCLUSION

The Louisiana appellate court committed a serious statutory interpretation error by concluding that the LHWCA did not apply to the plaintiffs' occupational disease tort claims against the Petitioners. If this Court does not correct this ruling, state courts will have the unfettered and arbitrary right to supplant federal law with state enacted remedies. The state court's ruling ignored and contradicted the 1984 amendment to the LHWCA, which specifies as a matter of federal law that in occupational disease cases, the time of manifestation controls the application of the LHWCA. Further, the state court decision was based upon an erroneous finding that the plaintiffs could elect a tort suit, as an alternative to a state compensation remedy, under concurrent jurisdiction principles. Federal law is clear that concurrent jurisdiction only exists between the LHWCA and state compensation remedies; concurrent jurisdiction does *not* exist between the LHWCA and state tort law. The Louisiana court's approval of a tort action against the Petitioners violates the exclusive remedy and exclusive liability provisions of the LHWCA.

Congress' dual objectives in enacting the LHWCA were to provide a no-fault compensation remedy for longshoremen injured on the job in exchange for providing employers and co-employees with immunity from suit. The state court's ruling is repugnant to both of these legislative objectives. The misguided approach of the state court deprives longshore employers and co-employees of the federally guaranteed right to tort immunity. It represents an impermissible override of federal law. Because federal law governs the interpretation of federal immunity statutes and federal law preempts state law when the exercise of state authority conflicts with federal law, the Louisiana court's ruling must yield to federal preemption of the field. Based upon controlling law, a writ of certiorari should

issue to the Louisiana Fifth Circuit Court of Appeal and the ruling below should be reversed by this Honorable Court. Otherwise, the Louisiana state courts will continue to jettison federal laws and essentially re-write Congressional mandates. This Court should explicitly pronounce that federal laws cannot be so cavalierly treated.

Respectfully submitted,

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